

February 18, 2015

Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
445 Twelfth Street, SW
Washington, DC 20554

Via Electronic Filing

Re: Notice of Ex Parte Communications, GN Docket Nos. 10-127, 14-28

Dear Ms. Dortch:

On February 12, 2015, Brad Burnham, Partner, and Nick Grossman, General Manager for Platform & Policy, for Union Square Ventures; Paul Geller, CEO of Bigger Markets; Ted Henderson, founder of Capitol Bells; Althea Erickson, Policy Director for Etsy; Brian Chase, General Counsel for Foursquare; Dan Kador, Founder and Chief Technology Officer for Keen.io; Matt Colbert, Founder and CEO of Spend Consciously; Michael Cheah, General Counsel for Vimeo, LLC; Alan Davidson, Director, Sarah Morris, Senior Policy Counsel, and Josh Stager, Policy Counsel for New America's Open Technology Institute (OTI); and Evan Engstrom, Policy Director for Engine Advocacy ("startup and venture capital representatives" or "representatives") met with Commissioner Jessica Rosenworcel; Priscilla Delgado Argeris, Senior Legal Advisor for Commissioner Rosenworcel; and Jennifer Thompson, Special Advisor and Confidential Assistant for Commissioner Rosenworcel; and later Gigi Sohn, Chairman's Special Counsel for External Affairs; Daniel Alvarez, Chairman's Legal Advisor on Wireline, Public Safety, and Homeland Security; Matt DelNero, Deputy Chief of the Wireline Competition Bureau; and Rosita Lopez, Intern, all on behalf of the Federal Communications Commission ("Commission"). During those two meetings, the startup and venture capital representatives made the following presentation regarding the Commission's Open Internet proceeding.

The Internet provides a decentralized, bottom-up and emergent tool for innovation; put another way, it allows tiny people to do huge things, without needing permission from market incumbents. The startup and venture capital representatives know from experience that it is vital to any startup or small company to have unimpeded access to its consumers via the Internet. Representatives applauded the Commission for taking strong steps to preserve the Internet as a platform on which companies large and small can thrive.

Clear Rules. To ensure that the Commission's Open Internet Order provides robust protection for both consumers and innovators, representatives offered specific recommendations for fine-tuning the proposed rules. The need for clarity was a theme running through the recommendations, as small companies in particular are at a disadvantage in navigating complicated regulatory frameworks and litigating contested proceedings. Bright-line prohibitions offer the clearest protections against harms that result from the terminating access monopolies that last-mile Internet service providers enjoy. To the extent the Commission permits case-by-

case adjudication and review for harms that are not explicitly banned, the Commission should provide clarity on the applicable standards, presumptions, and burdens of proof. Specific to the proposed nondiscrimination rule, representatives urged the Commission to ensure that the rule is clear that it prohibits discrimination of classes of applications in addition to discrimination against one particular application.

Interconnection. Representatives urged the Commission to make clear that the rules apply at the point of interconnection into the last mile. Specifically, representatives noted that service providers should not be permitted to use their interconnection points to demand fees from edge providers that effectively evade the bright-line and general conduct Open Internet rules that apply to Internet traffic within last-mile networks. The harms to edge providers and consumers that result from disputes at the point of last-mile interconnection are well documented.¹ Even providers that do not interconnect directly with carriers may be harmed by virtue of higher content delivery network (CDN) costs or poor quality of service.² To prevent and mitigate these harms, the Commission should require carriers to demonstrate why a challenged interconnection practice is not unjust and unreasonable.

General Conduct Rule. Representatives observed that, to the extent the proposed general conduct rule lists various factors that the Commission may take into account when evaluating carrier behavior, those factors should reinforce key network neutrality objectives. Specifically, the factors should include: (1) whether the practice is application-agnostic (*e.g.*, whether the practice discriminates against a particular service or an entire class of services, like video), (2) whether the practice protects consumer choice, and (3) whether the practice promotes low-cost innovation and free speech. At the same time, representatives recommended that the list not include a generic factor that allows carriers to claim that fees from the challenged practice are necessary to ensure broadband investment.

“Zero-rating.” Representatives observed that deals in which mobile carriers agree to “zero-rate” certain applications or services against consumers’ data caps or bandwidth costs in exchange for fees or other consideration from edge providers present the same problem that paid prioritization of Internet traffic presents: It creates hurdles for startups who lack the resources to pay for such preferential treatment and it distorts the market for applications and services in favor of incumbents. It is also problematic where a carrier favors its own services or those of an affiliate. Representatives urged the Commission to ensure that zero-rating is a practice that is covered by its proposed rules and will be evaluated on the same basis as other discriminatory practices.

Legal Authority. Representatives expressed concern about the Commission’s consideration of a “sender-side” theory for legal authority, even if that theory is only offered in the alternative to a

¹ “Beyond Frustrated: The Sweeping Consumer Harms as a Result of ISP Disputes,” Open Technology Institute, November 2014.

² Letter of Vimeo, LLC, GN Docket No. 14-28 at 1 (filed October 24, 2014) (observing that interconnection fees “are not subject to market competition” and that carriers’ ability to demand them “may reverse the historical decline in transit and [CDN] prices that have allowed companies like Vimeo to bring new and innovative services to consumers”).

primary theory grounded in Title II reclassification of consumer broadband. As other commenters have noted³, a sender-side approach could fundamentally disrupt the way the Internet has historically functioned by potentially creating legal privity between edge providers and carriers, no matter how distant the two actually are. Such a relationship could ultimately undermine the distinct, functional layers that allow the Internet to function as an end-to-end service. Representatives urged the Commission to adopt a theory that recognizes that broadband carriers' delivery of edge provider traffic is part and parcel of the unitary service that carriers promise and deliver to consumers—not a distinct and independent service to edge providers.

Pursuant to the Commission's rules, this notice is being filed in the above-referenced dockets for inclusion in the public record.

Respectfully submitted,

/s/ Sarah Morris

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³ Notice of Ex Parte Communications, Open Technology Institute at New America, GN Docket Nos. 10--127, 14--28 (October 30, 2014).